



negligence, negligent misrepresentation, breach of fiduciary duty, fraud, violation of the Texas Securities Act, violation of the Texas Deceptive and Unfair Trade Practices Act ("DUTPA") and violation of Section 10b of the Securities and Exchange Act of 1934 and Rule 10b-5, promulgated thereunder. Additionally, Plaintiffs purport to allege a cause of action against Hennessee Group for breach of contract.

4. Several, yet equally compelling reasons exist for the immediate dismissal of the First Amended Complaint. The First Amended Complaint fails to comply with Rule 10(b) of the Federal Rules of Civil Procedure ("FRCP") in that Plaintiffs did not make each averment of claim in separate numbered paragraphs. The First Amended Complaint also constitutes a "shotgun pleading" in that it fails to separate each theory of liability into individual counts, it does not specify which facts support which theories of liability and it does not specify which claims are being brought against each of the three named Defendants.<sup>2</sup>

5. Further grounds exist for the dismissal of all claims against Charles Gradante and Elizabeth Lee Hennessee in their individual capacity. First, the First Amended Complaint fails to comply with FRCP Rule 9(b) in that Plaintiffs' claims for fraud, negligent misrepresentation, violation of 10b and 10b-5, and violation of the Texas DUTPA are not pled with the requisite particularity as against Charles Gradante and Elizabeth Lee Hennessee. Furthermore, the First Amended Complaint fails to plead a legal basis for holding Charles Gradante and/or Elizabeth Lee Hennessee liable for a primary violation of 10b or 10b-5 or, secondarily liable as control persons of Hennessee Group, for its alleged violations. Thus, these claims should also be dismissed pursuant to FRCP Rule 12(b)(6).

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<sup>2</sup> In the face of a complaint in violation of FRCP Rule 10(b), the Court, in its discretion, may require a plaintiff to amend their complaint rather than dismissing the complaint altogether. However, under the circumstances of this case, where Plaintiffs are represented by experienced counsel who are charged with the responsibility of strictly adhering to the Federal Rules of Civil Procedure and because additional grounds for dismissal of the claims exist, dismissal of the First Amended Complaint is proper.

6. With respect to Plaintiffs' cause of action against Charles Gradante and Elizabeth Lee Hennessee under the Texas Securities Act, this claim should be dismissed pursuant to FRCP 12(b)(6) because the First Amended Complaint concedes that all investment recommendations and advice were given by Hennessee Group, not Charles Gradante and Elizabeth Lee Hennessee. Therefore, Charles Gradante and Elizabeth Lee Hennessee were not required to register as investment advisor representatives in Texas.

7. Finally, the First Amended Complaint fails to plead a basis in which to hold Charles Gradante and Elizabeth Lee Hennessee individually liable for negligence, gross negligence, breach of fiduciary duty and negligent misrepresentation because, at all times relevant to the transactions at issue, Charles Gradante and Elizabeth Lee Hennessee were acting in the regular course and scope of their employment with Hennessee Group. Additionally, Plaintiffs have not pled a basis for this Court to disregard the corporate entity and hold Charles Gradante or Elizabeth Lee Hennessee personally liable for any acts committed by Hennessee Group. These claims should also be dismissed pursuant to FRCP Rule 12(b)(6).

WHEREFORE, for the reasons stated above and those detailed in Defendants' supporting brief, Defendants respectfully request that the Court enter an Order dismissing the First Amended Complaint for failure to comply with FRCP Rule 10(b) and, with respect to the claims

against Charles Gradante and Elizabeth Lee Hennessee in their individual capacity, the same requests dismissal pursuant to FRCP Rules 9(b) and 12(b)(6).

Respectfully submitted,

JENKENS & GILCHRIST, P.C.

By: Seagal Wheatley by Mark Fasselt  
SEAGAL WHEATLEY  
Jenkins & Gilchrist, P.C.  
112 East Pecan, Suite 900  
San Antonio, Texas 78209  
Telephone: 210-246-5000  
Fax: 210-246-5999

*w/permission*

ELLEN SESSIONS  
Jenkins & Gilchrist, P.C.  
1445 Ross Avenue, Suite 3700  
Dallas, Texas 75202  
Telephone: 210-855-4500  
Fax: 214-855-4300

BENNETT FALK  
BRIAN AMERY  
Bressler, Amery & Ross, PC  
Huntington Centre II  
2801 SW 149<sup>th</sup> Avenue, Suite 300  
Miramar, FL 33027  
Telephone: 954-499-7979  
Fax: 954-499-7969

Attorneys for Defendants HENNESSEE  
GROUP LLC, ELIZABETH LEE  
HENNESSEE AND CHARLES  
GRADANTE

**CERTIFICATE OF SERVICE**

I hereby certify that on this 15<sup>th</sup> day of May, 2006, a copy of the foregoing Motion to Dismiss the First Amended Complaint Pursuant to FRCP Rules 10(b), 9(b) and 12(b)(6) was forwarded to the following counsel of record by certified mail, return receipt requested.

Marvin G. Pipkin  
Kortney M. Kloppe-Orton  
PIPKIN, OLIVER & BRADLEY, LLP  
1020 N.E. Loop 410, Suite 810  
San Antonio, Texas 78205

Seagal Wheatley by Mark Lassold  
SEAGAL WHEATLEY *w/permission*